In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 664

STEPHEN LILLO AND PATERSON BLOOD BANK, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In the United States District Court for the District of New Jersey, petitioners Lillo and Paterson Blood Bank, Inc., were convicted by a jury on 11 and 20 counts, respectively, of a 36-count indictment charging that they transported in interstate commerce, for the purpose of sale to various hospitals, whole human blood which had not been prepared at a licensed establishment, and which had been falsely labeled to conceal the fact that it was outdated and syphilitic, in violation of 42 U.S.C. 262. Petitioner Lillo was sentenced to concurrent terms of nine months' imprisonment, and petitioner Paterson Blood Bank, Inc., was

fined a total of $10,000. On July 21, 1965, a year after the appeals had been docketed, the court of appeals dismissed the cases for want of timely prosecution (Pet. App. 28a–29a). A motion to reinstate and restore the cases to the list of pending appeals was denied by order of September 13, 1965 (Pet. App. 39a). Petitioners seek review of this order.

The appeals below were docketed and the record filed on July 24, 1964. On that date, petitioners' retained attorney was notified by the clerk that the brief and appendix would be due on August 23 (S.R. 1–2).[1] On September 2, the court received and approved a stipulation extending the time to October 15 (Pet. App. 1a–2a). On January 5, 1965, the clerk notified petitioners' retained attorney that since no brief and appendix had been filed the cases would be called for dismissal on February 8 (S.R. 3). On January 29, the attorney filed a motion to file a typewritten brief, to file such brief out of time, to have the appeals heard on the original typewritten record and to dispense with the filing of an appendix (Pet. App. 3a–4a). Accompanying the motion was an affidavit of petitioner Lillo explaining that the delay in prosecuting the appeals had been occasioned by his difficulty in raising funds to pay for the costs of printing (Pet. App. 7a–9a). On February 9, the court granted leave to file a consolidated typewritten brief out of time, provided that a summary of the trial testimony be filed by February 26 (Pet. App. 15a). The brief was

[1] "S.R." refers to a supplementary record which is being lodged with the Clerk of this Court.

then submitted, but on February 26 petitioners' attorney moved to file the summary out of time on March 12 (Pet. App. 17a–18a), stating that this would enable him "to complete the job and to do it properly" (Pet. App. 20a). The motion was granted (Pet. App. 22a), but no summary was filed by the specified date. On March 30, the clerk notified petitioners' attorney that the last due date had passed (S.R. 4). On June 7, the clerk again reminded the attorney that the summary had not been filed (Pet. App. 27a). On July 1, the clerk notified the attorney that the appeals would be called for dismissal for want of timely prosecution on July 19 (S.R. 5). On that date, the attorney did not appear, but filed another motion for leave to file the summary out of time at another future date (Pet. App. 23a–27a). On July 21, the court denied this motion and dismissed the appeals for lack of timely prosecution (Pet. App. 28a–29a). On September 13, the court denied a motion by petitioners' present counsel to reinstate the appeals (Pet. App. 39a), after considering an affidavit by the earlier retained attorney which stated that "at all times [he] kept the appellant Stephen Lillo fully advised of the steps being taken to prosecute his appeal" (Pet. App. 31a), and an affidavit by petitioner Lillo which acknowledged that from time to time the attorney advised him that he was seeking extensions (Pet. App. 37a).

Although petitioner Lillo, who was free on bail during the delays detailed above, now seeks to dissociate himself from the inexcusable neglect of his retained attorney, the affidavits of record demonstrate

that he was regularly informed of the status of the case. He "cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent * * *." *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633–634. In the circumstances, the dismissal and the subsequent denial of the motion to reinstate were proper exercises of the court's discretion.[2] See *Dedmore* v. *United States*, 317 F. 2d 70 (C.A. 9); *United States* v. *Lefkowitz*, 284 F. 2d 310 (C.A. 2); *Christoffel* v. *United States*, 190 F. 2d 585 (C.A. D.C.); *Cline* v. *United States*, 116 F. 2d 275 (C.A. 5); *Garrison* v. *United States*, 97 F. 2d 563 (C.A. 5); *Capehart* v. *United States*, 26 F. 2d 81 (C.A. 8).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1965.

[2] The court received petitioners' brief on February 10, and consequently, at the time the case was dismissed, the court was not without information as to the merits of the appeals.

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